1972

Steven U. Healey v. Earl N. Dorius, Director, Driver License Division, State of Utah : Brief of Appellant

Utah Supreme Court

In The Supreme Court of the State of Utah

STEVEN U. HEALEY,
Plaintiff-Respondent,

-vs-

EARL N. DORIUS, Director,
Driver License Division,
State of Utah,
Defendant-Appellant.

Case No.
13000

BRIEF OF APPELLANT

APPEAL FOR A REVERSAL OF THE [illegible]
MENT OF THE THIRD JUDICIAL DIS[illegible]
COURT, IN AND FOR SALT LAKE CO[illegible]
STATE OF UTAH, THE HONO[illegible]
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TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Contents

Page

CASES CITED

Page

TABLE OF CONTENTS—Continued

Page

STATUTES CITED

OTHER AUTHORITIES CITED

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STATEMENT OF THE NATURE OF THE CASE

This appeal concerns the legality of a driver's license revocation by the appellant under Utah's Implied Consent Law, Utah Code Ann. § 41-6-44.10 (1953), as amended.

DISPOSITION IN LOWER COURT

On March 13, 1972, the appellant revoked respondent's driver's license for a period of one year effective February 9, 1972, for respondent's alleged failure to submit to a sobriety test under Utah Code Ann. § 41-6-44.10 (1953), as amended. Pursuant to the provisions of the Act, respondent sought a trial de novo

in the District Court in and for Salt Lake County for a determination of whether respondent's driver's license was subject to revocation under the circumstances. The case was heard before the Honorable Ernest F. Baldwin, Jr., on May 2, 1972. Judge Baldwin found that "petitioner did in fact constructively refuse to take a chemical test as required by 41-6-44.10(c), U.C.A. (1953) but that such refusal was not without reasonable cause" . . . (R. 6). There are no findings of fact or conclusions of law of record in the proceeding and no order other than that signed by Judge Baldwin on June 29, 1972 (R. 6). Based on the above order, Judge Baldwin ordered the respondent's license restored to him by setting aside the revocation of appellant dated March 13, 1972.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower court's order restoring the respondent's driver's license and seeks an order affirming the appellant's order of revocation.

STATEMENT OF FACTS

On December 28, 1971, at approximately 2:07 a.m., Officer Linden J. Roberts, a Murray City Police Officer, stopped and arrested the respondent, Steven U. Healey (Tr. 9) and advised the respondent of his rights under the Implied Consent Law (Tr. 10). The respondent said he would like to consult with his attorney

(Tr. 10) and the officer and respondent went to the Murray City Police Station. Respondent called his attorney, Mr. Wendell P. Ables, Esq., in the presence of Officer Roberts and Officer Gary Reid (Tr. 2, 3, 15, 16) who was prepared to administer the "breathalyzer" test to respondent. (Tr. 2, 10) Officer Roberts reported that the respondent was advised by his attorney not to take the test unless he (the attorney for respondent) was present at the time he was taking the test at the station. (Tr. 12) Officer Roberts told the respondent that it was his understanding that it was not necessary for his attorney to be present, just that he be advised to either take the test or not take the test and that he should call his attorney back. The respondent called Mr. Ables again at which time Officer Roberts talked to Mr. Ables and Mr. Ables said to Officer Roberts, "'Well, I'm advising him not to take it unless I'm present.'" He says, "'I'm not advising him not to take the test, no!'" He says, "'But I'm just saying, 'Don't . . . he . . . 'I don't want him to take that test unless I'm present there.'" (Tr. 13). This was approximately one hour since arrest. (Tr. 13) Respondent's attorney said it would take him one hour to get to the station due to personal reasons (Tr. 13). Officer Roberts advised respondent and respondent's attorney that by the time another hour went by his evidence of intoxication would have evaporated or diminished (Tr. 13). There was dispute in the record as to whether the attorney wanted to be there when the test was taken (Tr. 13) or just to talk to the respondent personally before taking any test

(Tr. 16, 17, 18, 22, 23). The refusal was filed out at approximately 3:20 a.m., (Tr. 14), an hour and thirteen minutes approximately from time of arrest. Mr. Ables did not talk to the respondent thereafter nor did he come to the Murray City Police Station, nor did respondent ask to call any other attorney.

On cross-examination, Officer Roberts stated that the respondent said, " 'I'm not refusing to take the test, because I'll take the test if my attorney's present.' " (Tr. 19, 22)

Mr. Ables then testified that he would not advise his client on confidential matters over the phone (Tr. 24) and he wanted to talk to him personally. (Tr. 3)

The respondent's attorney's contention is "that I have a right to consult with him (respondent) in person . . . and not go through a police switchboard on matters that are privileged and confidential . . . ." (Tr. 3)

Absent findings of record, the appellant looks to the transcript for the findings of the lower court. One such (Tr. 30) is whether, "when a man is under arrest and he consults his attorney, and that attorney tells him, "Don't take the test until I get there", is that "reasonable cause" to refuse to take it until he gets there? Another is what is meant by "reasonable cause"? (Tr. 31), to refuse. A third contention of the Court was that the appellant has the burden of proving that respondent "did not have a reasonable cause to submit to the test." (Tr. 32).

A fourth, that there is a distinguishable shade of interpretation between "a reasonable cause not to submit" and a "reasonable cause to follow counsel's advise." The court concludes (Tr. 34) that "he (respondent) did not submit to the test, but that his refusal to submit, or his failure to submit was based upon advice of counsel, and, therefore, that he had reasonable cause not to submit. . . ." (Tr. 34).

The court then reiterates (Tr. 35):

THE COURT: I will find that he did not submit to the test, and he did not submit upon advice of counsel, and would not submit until counsel arrived, and counsel indicated counsel would not arrive for one hour, and only that, his statements that he would not submit until counsel was there—it was just and reasonable cause.

I must take the implication, if you have a right to counsel, that it's only reasonable that you will follow counsel's advice. . . .

THE COURT: As I say, I see nothing wrong with anything in the Officer's conduct, and I have to say this man didn't act unreasonably, *because he was told what to do.*" (Emphasis ours.)

Respondent was fully aware that his refusal to submit to one of the tests could result in the revocation of his license for one year. (Tr. 10), (Tr. 14, 20). Respondent's attorney was likewise aware of this fact. (Tr. 14, 20, 29, 23).

BACKGROUND

This is no doubt in the hope of curbing the tremendous increases in drunken driving and to help overcome many of the evidentiary difficulties in proving such intoxication, the legislatures in Utah and several other states have enacted implied consent laws requiring persons to submit to breath, blood, urine or saliva tests or lose their license for refusing to do so. 62A Consolidated Laws of New York, Article 31 § 1194; 7 North Dakota Century Code 39-20 Chemical Test for Intoxication: Implied Consent; Utah Code Annotated 41-6-44.10. These laws have been discussed rather widely in Law Review articles throughout the country and in the American Law Reports. 18 Albanq L.Rev. 203; 17 Albany L.Rev. 258; 51 Mich. L.Rev. 1195; 44 Minn L.Rev. 673; 35 Tex. L.Rev. 813; 88 A.L.R.2d 1064.

As the laws presently stand, two requisites are essential to validify the revocation of a license. These are:

(1) The requirement of an appropriate invitation to take the test, including

(2) the prerequisite arrest,

(b) sufficient probable cause to consider the invitee to be intoxicated, and

(c) an appropriate opportunity to select the test to be applied if, as in Utah, such privilege is available; and

(2) the refusal, either expressed or implied, must be communicated to, or reasonably presumed by, the in-

viting officer. (See *Ringwood vs. State,* 8 U.2d 287, 333 P.2d 943 (Utah 1959)) See also: *Timm v. State,* 110 N.W.2d 359, (N.D. 1961).

The relevant wording of Section 41-6-44.10, U.C.A., is as follows:

> (a) Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test of his breath or blood for the purpose of determining the alcoholic content of his blood, provided that such test is administered at the direction of a peace officer having reasonable grounds to believe such person to have been driving in an intoxicated condition. The arresting officer shall determine within reason which of the aforesaid tests shall be administered . . . (c) If such person has been placed under arrest and has thereafter been requested to submit to any one of the chemical tests, provided for in subsections (a) or (b) of this section and refuses to submit to such chemical test, the test shall not be given and the arresting officer shall advise the person of his rights under this section.

ARGUMENT

POINT I

THE PEACE OFFICER IN THE INSTANT CASE AFTER ARRESTING THE RESPONDENT AND GIVING HIM HIS APPROPRIATE WARNINGS HAD REASONABLE CAUSE TO BELIEVE THE RESPONDENT WAS INTOXICATED.

According to the record, Officer Linden J. Roberts placed respondent in the patrol car and under arrest and then warned respondent of his rights. As indicated in the testimony of Officer Roberts and counsel for respondent stipulated, there was reasonable cause for arrest, the respondent drove his car at an extremely high rate of speed, sidewashed down the road, and straddled the white line down the middle of the road. (Tr. 9)

POINT II

THE RESPONDENT WAS GIVEN AMPLE OPPORTUNITY TO SUBMIT TO HIS CHOICE OF THE OFFERED SOBRIETY TESTS.

The record contains invitations from Officer Roberts for the respondent to submit to one of the tests. The respondent and his counsel knew that his refusal could, according to the statutory language read to him, result in the revocation of his license on that basis alone

(Tr. 14). The refusal to submit to a sobriety test was sufficient in and of itself to justify revocation. In *Prucha v. Department of Motor Vehicles,* 172 Neb. 415, 110 N.W. 2d 75 (1961) the court held that the revocation was not arbitrary and capricious because of the fact than an acquittal of a criminal charge had no bearing on the provisions of the law separate and distinct from criminal statutes. *Prucha v. Dept. of Motor Vehicles, supra;* also *Combes v. Kelly,* 2 Misc. 2d 591, 152 N.Y.S. 2d 943 (1956); *Anderson v. Macduff,* 208 Misc. 271, 143 N.Y.S. 2d 257 (1955).

POINT III

RESPONDENT'S REFUSAL TO DECIDE WHETHER OR NOT TO SUBMIT TO A REQUIRED CHEMICAL TEST UNDER U.C.A. 41-6-44.10 AS AMENDED UNTIL A PERSONAL CONFERENCE WITH ATTORNEY IS NOT "REASONABLE CAUSE" NOT TO SUBMIT, IF TIME OF PERSONAL CONFERENCE IS SO FAR REMOVED AS TO RENDER POTENTIALLY OBTAINABLE TEST RESULTS MEANINGLESS.

A main question for review by this court is: Is reasonably following advice of attorney, (whether reasonable or unreasonable) reasonable cause to refuse to submit to a sobriety test, and therefore sufficient to excuse the taking of said test?

There can be no dispute of facts that respondent did refuse to decide to take the sobriety test until his attorney could personally come to the Murray City Police Station and talk to him. There is likewise no dispute that the respondent talked to his attorney twice from the station on the phone, and consulted with him and that by the time the attorney could get to the station (by his estimate) two hours plus from the time of arrest would have elapsed, which time, the officer considered to be too late in time for the breathalyzer test. There was no evidence at trial to refute the officer's opinion that any results then obtained would essentially be useless.

The advise of respondent's attorney was not to take the test or do anything until he (the attorney) got there. The respondent followed this advice.

Clearly it is apparent that one hope of delay or waiting can be that a delay of test will show a lessor alcoholic content in the blood. There is some testimony that that was not a factor.

It is too broad an extension of "following advice of his attorney" to say that he reasonably does whatever his attorney tells him to do (whether said advice be good or bad or correct or incorrect) under the statutes or the law that that is "reasonable" and is not, therefore, a "refusal to submit to a chemical test" . . . without a reasonable cause. . ."

Such reasoning would make mockery of the very purpose of the Implied Consent Law and would give

such party arrested a reason not to submit in every case and in a sense, therefore, "put the blame on Mame, Boys" (i.e. the arrested parties' attorney). An attorney then could, with impunity, advise clients in similar circumstances not to take the required test until the attorney comes to the jail whether he, in fact, did or not so come; which then means the officers would have to, in each case, wait before booking procedures for unusual periods of time. This would completely upset their work schedules, they not knowing for sure whether an attorney will or will not come—all the while any measurable quantitative test and its use or validity deminishing to the point of non-value.

A driver on the highways of Utah is presumed to know the law. The statutes, called the "Implied Consent Law", puts the duty on the arresting officer to advise the party arrested of his rights. For one lawfully arrested (and here this is not an allegation to the contrary) who thereafter refuses the chemical test or tests, after an explanation of the consequences of such refusal; *the party so arrested* must determine whether to take the test and risk evidence that could result in a criminal conviction or to refrain from taking the test as required of all such drivers on our highways and risk losing his privilege to drive an automobile for one year. This must all be achieved within a "reasonable" time, or without unduly delaying the officers in other duties to be performed. The other exception by statute would be that said arrested party did not have some "reasonable cause" for refusing to submit to the test or tests.

This court can as readily determine the existence of a "reasonable cause" not to submit from the evidence as could the trial court.

Appellant contends that the present ruling of the trial court is in error in that, for the respondent to reasonably follow his attorney's advice and not submit to the test within a reasonable time (not controverted at trial) was not a valid excuse of failure to submit to the test for a reasonable cause. Appellant feels the trial court, in postulating the above as excusable conduct for respondent not to submit, is attempting to draw some distinction wihout a difference as relates to following his attorney's advice. This, in every case, carried to its logical conclusion, could make the villain of the attorney, not the one arrested, and the one with the duty of decision, rather than respondent, and the results that flow from that decision could be totally opposite from the purpose intended by the legislature.

POINT IV

AS A MATTER OF LAW, A SOBRIETY TEST SHOULD BE HELD AVAILABLE ONLY SO LONG AS THE RESULTS THEREFROM WOULD HAVE SOME PROBATIVE VALUE.

The statute does not catagorically state that an arresting officer shall offer a sobriety test once and if refused, then said refusal, regardless of place or time

lapse is forever binding. In fact, custom and procedure of almost all peace officers (and certainly in the instant case) is that said Implied consent rights, as well as the invitation to take a sobriety test, are covered at the time of arrest and at the place of proposed testing, and at the latter place, often several times.

The statute does state, however, that the arresting officer should be respectfull of the rights of the accused, and if the one arrested refuses, the test shall not be given. Often it is the case that the arrested party refuses at the scene of arrest and then at the place of proposed testing, or booking into jail, after consulting legal counsel, the person changes his mind and agrees to submit to a chemical test.

The arrested party certainly should have the right to reconsider, to change his mind, so long as, but *only so long* as the results from the proposed test, whichever it be, are still of some probative value. The Hunter case says a reasonable time (*Hunter vs. Dorius,* 23 Ut.2d 122). What that reasonable time is may vary from case to case, conditioned on facts such as: time of arrest or accident, time of consumption of last alcoholic beverage, time of last meal, whether blood test is proposed, breath test in proposed or a urine test, as the case may be.

The State has a valid interest as well as the individual arrested in an objective test of the level of alcohol in a drivers bloodstream. This is true for protecting the rights of the arrested driver, as well as for the bet-

terment of law enforcement. The State makes these tests available to exonerate as well as to implicate, and it is in the interest of both sides to such human drama to make the test available so long as the results will have probative value. However, the time comes when sufficient periods have elapsed from arrest to potential testing that the obtainable results are really of no measurable quantity and, therefore, of no value.

Whether of blood or breath or urine, that time, unless controverted, is best established by the peace officer, technician or doctor that is qualified and is going to administer the test.

Certainly, from the facts of this case, the peace officer felt two hours was unreasonable, he communicated that fact to both Mr. Healey and his attorney on two occasions relatively close together. They did not choose to do other than wait and did not, at the time of trial, put forth any evidence that Officer Roberts was wrong in his value judgment as to lapsed time working the potential test virtually meaningless.

POINT V

RESPONDENT'S ACTIONS CONSTITUTED A REFUSAL UNDER U.C.A. 41-6-11.10 AND OFFICER ROBERTS WAS JUSTIFIED IN CONCLUDING THAT THE REFUSAL TO SUBMIT TO CHEMICAL TEST (EXHIBIT D-1) WAS COMPLETED.

The Utah cases relating directly to revocation of a driver's license for failure to submit to a test under the statute are only these: *Bean v. State*, 12 Ut. 2d 76, 362, P.2d (1961); *Ringwood v. State*, 8 Ut.2d 287, 333 P.2d (1959); *Hunter v. Dorius*, 23 Ut. 2d 122, 458 P.2d 877. The first two of these cases invalidate the revocation because the officer failed to give the accused his choice of which test of those offered under the statute he would take. The *Hunter* case is distinguishable because the respondent was clearly given his choice and in the instant case respondent was also given his choice. (Tr. 11).

Several other courts have considered what action is sufficient to constitue a "refusal" under the law. Of course, this is primarily a factual consideration. However, in the instant case the facts indicate that the respondent was first asked to submit to a chemical test while in the patrol car (Tr. 10). The time of such stated in the record was some time after 2:07 a.m. and before 3:00 a.m. The latter of which times was approximately the time they were at the Murray City Police Station, talking to respondent's attorney. The invitation continued open from 2:04 a.m., until after the respondent contacted his attorney there and communicated his advised refusal not to do anything until his attorney got there to Officer Roberts. At this point, the refusal was completed according to the facts and Officer Roberts was justified at that point to draft the report of "refusal to submit to a chemical test" form. However, Officer Roberts still allowed respondent to decide for himself by inviting him to again submit to the test.

At 3:20 a.m., one hour and 13 minutes after the arrest, the refusal form was completed.

Courts have considered that an implied refusal is sufficient. *Calciano v. Hults,* 13 App. Div.2d 534, 213 N.Y.S. 2d 500 (1961); *Clancy v. Kelly,* 7 App. Div.2d 820, 180 N.Y.S. 2d 923 (1958). The instant case is not rested on solely the implication. The record clearly reveals the communication of a continued refusal for one hour 13 minutes after the arrest occurred. There comes a time when the utility of such a sobriety test would become marginal. It should be apparent that the law enforcement officials should not be required to beg and plead with a reluctant defendant for an unreasonable length of time. The rights of an accused are better protected by requiring the accused to make his own decision and not be coerced or pressured by law enforcement officials. The enforcement officials should not have their time burdened by such potential unreasonable delays before testing would have occurred. The officer's judgment was that it would be of little or no value in one more hour (two hours from arrest).

In *Taylor v. Kelly,* 5 App. Div.2d 931, 171 N.Y.S. 2d 909 (1958) the court stated that there was clear and direct proof of the licensee's refusal to take the blood test. The arresting officer and arraigning justice had both testified of the petitioner's refusal to submit to one of the sobriety tests offered. The instant case offers similar evidence from the arresting officer, plus a confirmation of the refusal to decide or submit to the

test by the officer by the respondent until such time had elapsed as to make this particular test meaningless.

The claim that no refusal was communicated to an officer is primarily a factual consideration that has usually been received by courts with skepticism and most often reflected on the basis of the facts.

POINT VI

THE HUNTER V. DORIUS CASE DOES NOT CONTROL AS RELATES TO THE TIME LAPSE, TYPE OF SOBRIETY TEST INVOLVED, OR RIGHT OF COUNSEL IN CIVIL ASPECT UNDER THE IMPLIED CONSENT LAW.

Counsel for respondent says *Hunter and* the time frame of *Hunter* categorically apply, yet that case involved a blood test, not breath, and involved a consent subsequent to refusal, followed by an arbitrary refusal to test by the officer with no evidence apparently that a blood test at that point would have been valueless.

It is altogether different in the case before us. The arrested party would not say whether he would submit until he talked to his attorney. He did talk to his attorney, not only once, but twice. The officer also talked to the attorney told him he knew of no statute or procedure that made it a matter of law or right for the attorney to be present when the arrested party was tested. He opinioned, when he found on inquiry that another hour would lapse before the attorney could be at the

Murray Police Station, that was too long for testing and that the attorney should advise his client now. He declined to do so. The respondent declined to submit until his attorney was there. This is clearly a refusal under the best interpretation of the facts of the case here; with absolutely no showing by respondent that the breathalyzer test results would still be of value in an hour beyond 3:30 a.m.

The *Hunter* case (*Hunter v. Dorius*) 23 Utah 2d 122, should not be expanded unreasonably to cover cases where the arrested party either cannot find his attorney; or the arrested party voluntarily gives up trying to contact an attorney; or as in this case, contacts his attorney but suspends a decision *he* (Emphasis ours) must necessarily make, within a reasonable time, until he can see his attorney, which time may well be so far removed from time of arrest as to invalidate any results then obtainable by chemical test.

This case is distinguishable from the *Hunter* case in that the attorney for Dr. Hunter requested the officer to give a blood test (specified) and it was apparently still available, there was no apparent evidence that such blood test results would not be of some value, but the test was refused because, apparently, at that point the officer involved was somehow "irked" at the arrested party, and there was an "air" of arbitrariness, shortness, etc., about the encounter at that point.

In the case at bar, the arrested party was amply and numerously advised of his rights; he consulted

counsel and followed counsel's advice and at that moment both counsel and respondent were on notice that respondent's failure then to decide on taking a *Breathalyzer* (Emphasis added) was, in the officer's opinion, a refusal because any results from a test possible after counsel could get to the station would be of little or no value at all; and there was no evidence at trial to refute this opinion. (Further, there was no real assurance of going forward with the test after the additional hours wait). The officer was not arbitrary, out of sorts, or impolite to the respondent, in fact, he insisted that they call Mr. Ables back a second time so both would clearly understand the respondent's right and his (the respondent's) duty of decision since this is a civil matter.

In the case at bar, the decision of the trial court in the hearing de novo, apparently is bottomed on the premise that respondent had a *right* (Emphasis supplied) to counsel before deciding whether he would or would not take the test. That right exists under the *"Miranda"*[1] case, where the actions are criminal in nature. There is serious doubt in many jurisdictions that such a right to counsel exists in the civil aspects of the Implied Consent Law where an arrested party must decide whether or not to submit to a type of sobriety test. *Mills v. Bridges,* 471 P.2d 66, 93 Idaho 679; I.S. § 49-352.; *Garcia v. Department of Motor Vehicles,* 456,

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1. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

P.2d 85.; *Rust v. Division of Motor Vehicles,* et al., 1971, 267 C.A.2d 545, 73 Cal. Rptr. 366.; *Stratikos v. Department of Motor Vehicles,* (1968) 477 P.2d 237; *People v. Brown,* 485 P.2d 500; *Johnson v. Department of Motor Vehicles,* 485 P.2d 1258 (Oregon 1971); *Campbell v. Superior Court in and For Maricopa County,* 479 P.2d 685, 106 Ariz. 542; *Goodman v. Orr,* 1971, 97 Cal. Rptr. 226, 19 CA 3rd 845.

A recent Colorado case has held that Implied consent statute is not unconstitutional on grounds that it violates right to travel upon state highways, or that it constitutes violation of due process by compelling citizen to choose either his right to refuse to surrender evidence that would help to convict him or his right to retain license to drive or by creating crime of refusing to consent to blood test punishable by forfeiture of right to drive while denying fundamental rights of person charged with criminal offense, or that it enforces warrantless and unreasonable searches and seizures, or that it sanctions invasion of right of privacy or privilege against self-incrimination. Const. art. 2, §§ 3, 7; U.S.C.A. Const. Amends. 4, 9; 1967 Perm.Supp., C.R.S., section 13-5-30(3) et seq. *People v. Brown,* 485 P.2d 500.

California has numerous cases on the specific question of rights to counsel deciding such a right does not exist as to Implied consent, this before they amended their statutes in 1970, and codified that fact (see sentence three, Section No. 13353 paragraph (a), Cal-

ifornia Motor Vehicle Code and amended, Chapter 1103, statutes 1970. Effective November 2, 1970.

The Implied Consent Law of California (prior to amendment), Idaho and Oregon all have provisions similar to the language of Utah Section 41-6-44.10, U.C.A. 1953, as amended, section (a). In several cases before the courts of last impression the decisions are unanimous that the right to counsel before a decision to submit does not exist on the civil aspect. (See previously cited cases.)

The only varience appellant could find to this ruling (which non-the-less pronounced the validity of such a rule), was in the Rust case (see *Rust v. Division of Motor Vehicles*, et al., 1971, 267 C.A.2d 545, 73 Cal.Rptr. 366) which held that while "Miranda" rights do not apply to the Implied Consent Law, there may be a factual issue that the officer did not make it clear to the arrested party as to the differenciation between criminal and civil rights and if that results in confusion to the arrested party and that is not cleared up by the officer, then there may be a question as to the arrested party's refusal to submit.

An Oregon case on rehearing on the question of presence of his attorney held that the Driver's refusal to take a breathalyzer test without having his attorney present was a refusal to take the test under the Implied Consent Law, and justified suspension of his Drivers License. (See *Stratikos v. Department of Motor Vehicles*, (1968) 477 P.2d 237, adheared to and Supple-

mental 478 P.2d 654; also *Johnson v. Department of Motor Vehicles, et al.*, 485 P.2d 1258.) (See also *Mills v. Bridges*, 471 P.2d 66, 93 Idaho 679; *Ent v. Department of Motor Vehicles*, 265 A.C.A. 1073, 71 Cal.Rptr. 726; *Finley v. Orr*, 262 A.C.A. 711, 69 Cal.Rptr. 137.

In the *Ent* and *Finley* cases the refusals were likewise upheld. The language in another recent California case is supportive, (see *Funk v. Department of Motor* Vehicles, 1 Cal.App.3rd 449, 18 Cal.Rptr.

The *Hunter* case *Supra*, states the plaintiff therein "still had a reasonable time in which to make up his mind and to seek legal counsel." This was concluded on that set of facts after counsel for the defendant *conceded* that "the plaintiff had a right to consult legal counsel before making a decision to take or decline the test." (see *Hunter v. Dorius*, 2 Utah 2d 124, line 16.) Such a right was not a contested issue of the *Hunter* case, it was conceded by defendant and not disturbed on review by this Honorable Court as the court felt the lower court ruling was supported by the evidence.

Fundamental to the issues of this case and review thereof is the question of such a right to counsel, civil right, under the Implied Consent Law, and the further question of what, under these facts, was a reasonable time for decision making and testing by respondent.

Appellant respectfully submits that such an absolute right to counsel does not exist under the Implied Consent Law.

POINT VII

THE TRIAL JUDGE ERRED IN NOT REQUIRING THE REVOCATION OF THE RESPONDENT'S DRIVER'S LICENSE TO REMAIN VALID UNDER THE PRESENT FACTS.

We submit that the Judge in the trial court erred in not requiring the revocation to remain valid under the circumstances.

The record reveals that, though the respondent alleges he did not refuse the tests, (only refused to do anything until his attorney arrived) the court agreed that the respondent said to Officer Roberts he would not take the test because Mr. Ables, the attorney contacted, told him not to do so, unless he, Mr. Ables, were there. (Conflict of course in testimony as to whether there at the police station to "advise" or be present as a matter of right "for the test"). With such an admission in the record, and finding by the court, the court erred in demanding the license to be returned. Section 41-6-44.10, U.C.A., requires:

> If such a person is placed under arrest and has thereafter been requested to submit to any one of the above chemical tests, and refuses to submit to such chemical tests, the test shall not be given and the arresting officer shall advise the person of his rights under this section.

This is a civil statute not criminal.

The statute does not *require* the officer to invite the accused to take the test more than once. In the instant case, Officer Roberts extended himself on two occasions to allow the respondent to submit to the test and the lower court erred in not allowing the refusal to stand and the revocation to be complete.

A case directly on point as to the facts of this case is the *Johnson* case, *supra* decided June 17, 1971, where the attorney advised taking a breathalyzer when he got there. The Court said that any erroneous impression upon which petitioner relied was created by his counsel, not the police and the court reversed the trial court. *Johnson v. Department of Motor Vehicles of the State of Oregon, Appellant,* 485 P.2d 1285.

CONCLUSION

The appellant respectfully submits that based upon a review of the uncontroverted facts, the trial court erred in refusing to allow the revocation of the respondent's driver's license to remain binding.

Respectfully submitted,

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